Supreme Court, U.S.
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No: _____

IN THE
UNITED STATES SUPREME COURT
October Term 1994

Michael Schneider and Roisin Schneider, individually and as guardians of Slaine Schneider,

Petitioner,

-vs-

United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

A. WHETHER THE MILITARY CLAIMS ACT, 10 U.S.C. §§ 2731 ET SEQ., ALLOWS JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS OR, IN THE ALTERNATIVE, ONLY ALLOWS JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS WHEN CONSTITUTIONALLY PROTECTED RIGHTS HAVE BEEN VIOLATED?

B. WHETHER THE UNITED STATES AIR FORCE ADMINISTRATIVE REVIEW OF SLAINE SCHNEIDER'S CLAIMS UNDER THE MILITARY CLAIMS ACT, 10 U.S.C. §§ 2731 ET SEQ., VIOLATED SLAINE SCHNEIDER'S CONSTITUTIONAL RIGHT TO DUE PROCESS?

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The Petitioners respectfully ask that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eight Circuit entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Hanson, J.) is reported at 27 F.2d 1327 (8th Cir. 1994) and is reprinted hereto at App. 1A. The opinion of the United States District Court for the District of Minnesota (Murphy, J.) is not officially reported. This decision was filed as Civil File Number 4-92-823 and is reprinted hereto at App. 16A. The administrative decisions of the United States Air Force are reprinted hereto at App. 26A and App. 28A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 24, 1994, and is reprinted in the appendix at App. 1A. Jurisdiction to review by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Secretary of the Air Force is authorized to pay claims brought by dependents who suffer a personal injury overseas under 10 U.S.C. § 2733(a)(3). This statute provides:

> Under such regulations as the Secretary concerned may prescribe, he, or subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for --
>
> . . .
>
> (3) personal injury or death.

10 U.S.C. § 2733(a)(3).

Pursuant to 32 C.F.R. § 842.49(a)(b), the Military Claims Act allows for settlement of two types of personal injury claims:

(a) claims arising from negligent or wrongful acts or omissions committed by United States military or civilian personnel while acting within the scope of their employment.

(b) claims arising from noncombat activities of the United States, whether or not such injuries or damages arose out of the negligent or

> wrongful acts or omissions by United States military or civilian employees . . .

32 C.F.R. § 842.49(a)(b).

Whether decisions made by the Secretary of the Air Force are reviewable is subject to the language provided in 10 U.S.C. § 2735. This statute provides in relevant part, "Notwithstanding any other provision of law, the settlement of a claim . . . is final and conclusive." 10 U.S.C. § 2735.

STATEMENT OF THE CASE

Slaine Schneider was born on April 23, 1987. Her father, Michael Schneider was stationed in the United Kingdom serving in the United States Air Force. In 1988, Slaine Schneider began to treat with the United States Air Force Hospital in Upper Heyford, England for right ear drainage and associated problems.

Slaine Schneider had continuous consultations with health care providers affiliated with the United States Air Force Hospital for right ear infections and right ear drainage for a two and half year period. On June 26, 1989, an Air Force physician, Dr. David R. Range performed a

myringotomy[1] with a tube placement in Slaine Schneider's right ear.

Following surgery, Slaine Schneider continued to treat with Dr. Range at the Air Force Hospital without relief of her ear symptoms. On October 24, 1989, Dr. Range performed removal of a polyp or growth from the right ear. The surgical report notes that there was a perforation in the tympanic membrane. On November 16, 1989, Dr. Range performed a modified radical mastoidectomy[2]. Postoperatively a diagnosis of cholesteatoma[3] was made with a note that the cholesteatoma had eroded through the bone.

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[1] "Myringotomy" is a surgical procedure in which a tube is inserted to accomplish a paracentesis of the tympanic membrane. Stedman's Pocket Medical Dictionary 489 (1987).

[2] "Mastoidectomy" is a procedure in which the mastoid is surgically excised or a portion thereof through curetting or gouging. Stedman's Pocket Medical Dictionary 436 (1987).

[3] "Cholesteatoma" is a tumor-like mass of keratinizing squamous epithelium and cholesterol in the middle ear, usually resulting from chronic otitis media, with squamous metaplasia or extension of squamous epithelium inward to line an expanding cystic cavity that may involve the mastoid and erode surrounding bone. Stedman's Pocket Medical Dictionary 138 (1987).

On December 15, 1990, a civilian doctor performed a fourth surgery for recurrent cholesteatoma and the operative report indicates that much of the ear drum was gone. Slaine Schneider today suffers from right ear deafness.

Slaine Schneider's claims of medical negligence are based upon the two and a half year delay in the diagnosis of the cholesteatoma and a failure to provide treatment for the right ear drainage as articulated in the expert physician's report. The Schneiders contend that there was diagnostic testing available to facilitate the diagnosis and that if proper treatment would have been properly provided to Slaine Schneider, she would not be deaf.

Significant to Slaine Schneider's claim is the fact that the Air Force physician, Dr. Range, advised the parents prior to the November 1989 surgery that he had never seen the procedure performed for cholesteatoma, nor had he ever performed one himself. It is the Schneiders' contention that Dr. Range advised them that he was to have a more experienced surgeon available at the time of surgery but that the physician failed to appear.

Slaine Schneider's parents brought administrative claims under the Military Claims Act, 10 U.S.C. §2731 et seq. The following is a summary of the procedural history

of the Air Force Review of Slaine Schneider's claim under the Military Claims Act:

1.	July 2, 1991	Schneiders present claim pursuant to the Military Claims Act.
2.	November 13, 1991	U.S. Air Force Through Capt. Tamara Riley requested a current audiological examination of Slaine Schneider.
3.	November 26, 1991	Slaine Schneider, through counsel advised the Air Force that a current audiological test had been requested from the clients.
4.	January 13, 1992	Letter from the Air Force by Capt. Tamara Riley advising that the file had been sent to AFLSA-JACC Medical Law Building, 5683 Bolling Air Force Base, Washington D.C. for final disposition. A second request for audiological examination was made.

5.	March 16, 1992	Letter of Schneiders' through counsel to the Judge Advocate's office advising that no contact had been made by the Bolling Air Force Base, asking for the identity of a contact person and enclosing a current audiologicalexamination that had been received from client.
6.	March 17, 1992	Air Force denial of Slaine Schneider's claim based upon "No breach in the standard of care" and lack of "evidence of negligence."
7.	May 5, 1992	Appeal of denial sent with expert physician letter supporting the allegations of negligence.
8.	May 14, 1992	Colonel Philip Meek issued final denial staying no further administrative action can be taken. "without a showing of negligence I can simply not approve the claim for payment."

The Schneiders then commenced an action in Federal District Court on September 2, 1992, seeking a review of the United States' improper administrative review in violation of Slaine Schneider's due process rights and a declaration that the United States has erroneously denied payment. The United States Government moved for a dismissal based upon lack of subject matter jurisdiction under Rules 12(b)1 and 12(b)6 of the Federal Rules of Civil Procedure. The United States District Court for the District of Minnesota, with the Honorable Diana Murphy presiding, dismissed the Complaint on February 1, 1993.

The Schneiders appealed the decision of the United States District Court to the United States Court of Appeals for the Eighth Circuit. The court of appeals held that agency decisions made pursuant to the Military Claims Act are not subject to judicial review; that the lack of judicial review does not violate Slaine Schneider's equal protection rights; and that Slaine Schneider's due process rights were not violated by the decision-making process of the Department of the Air Force.

REASONS FOR GRANTING THE WRIT

The issue of whether the Military Claims Act, 10 U.S.C. §§ 2731 et seq., allows for judicial review of agency decisions is one of first impression for this Court. This issue

is one of importance to the administration of justice in that without judicial review of these decisions, the claims of injured dependents may be summarily dismissed. In addition, whether judicial review of these decisions is allowed under the ambiguous language of the Act is a question of importance.

Furthermore, review of this case is necessary to affirmatively determine whether, at the very least, judicial review of an MCA claim is available when a failure of due process is implicated. It has been suggested by a few courts that this type of limited review may be available. See Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983), (quoting Scroggins v. United States, 397 F.2d 295, 297, cert. denied, 393 U.S. 952 (1968)); Hata v. United States, No. 92-56142, 1994 WL 145108 (9th Cir. Apr. 26, 1994); Rodrigue v. United States, 968 F.2d 1430, 1432 (1st Cir. 1992). Petitioners, for the reasons set forth below, respectfully ask that this Court grant certiorari to reverse.

A. WHETHER THE MILITARY CLAIMS ACT, 10 U.S.C. §§ 2731 ET SEQ., ALLOWS JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS OR, IN THE ALTERNATIVE, ONLY ALLOWS JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS WHEN CONSTITUTIONALLY PROTECTED RIGHTS HAVE BEEN VIOLATED?

The federal court determined that the relevant subsection of the Military Claims Act, 10 U.S.C. § 2735 provides, "Notwithstanding any other provision of law, the settlement of a claim . . . is final and conclusive," precludes judicial review. This language, however, does not conclusively deny judicial review of administrative decisions made under its provisions. Rather, there must be clear and conclusive proof that judicial review was not intended. See Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985); Rusk v. Cort, 369 U.S. 367, 379-80 (1962); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The presumption of judicial reviewability is only overcome "by specific language or specific legislative history that is a reliable indicator of congressional intent." Block v. Community Nutrition Inst., 467 U.S. 340 (1984).

The legislative history of the Military Claims Act does not provide clear and convincing evidence that Congress intended to foreclose all judicial review. To the extent that history is instructive, it supports the view that the finality language is aimed at future administrative review, not at preclusion of judicial relief. Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978).

The First Circuit, in Rodrigue v. United States, 968 F.2d 1430 (1st Cir. 1992), dismissed a claim brought under

the Military Claims Act but left open the door that judicial review may be warranted when a violation of constitutionally-protected due process rights has occurred. The lower federal district court accepted subject matter jurisdiction initially in the Rodrigue case and stated, "most of the courts that have held that § 2735 precludes judicial review have failed to analyze the statute's legislative history." Rodrigue v. United States, 760 F. Supp. 223 (D. Mass. 1991), rev'd 968 F.2d 1430 (1st Cir. 1992).

According to the federal court in the Rodrigue case:

> The legislative history of the Military Claims Act contains two references to the meaning of "final and conclusive" in 10 U.S.C. Section 2735. The section of the Senate Report entitled "Purpose of the Legislation" states: "The proposed legislation would be consistent with the cited general policy of preventing other agencies of the Government from reviewing and reversing actions on claim settlements of agencies specifically authorized to settle and pay certain claims." S.Rep. No. 1056, 92d Cong., 2nd Sess., reprinted in 1972 U.S. Code Cong. & Admin.News. 3106, 3109-10 (emphasis added). The second reference appears in an earlier letter from the Assistant Secretary of the Interior to Senator James Eastland, Chairman of the Senate Judiciary Committee. The letter states: "No provision is made for appeal to the courts. On the contrary, the bill provides that the

administrative settlement of a claim is final and conclusive." 1964 U.S. Code Cong. & Admin.News 3407 at 3414-15.

After examining the statutory language and the legislative history of Section 2735, I conclude that there is no "clear and convincing" evidence that Congress intended to preclude all judicial review of administrative settlement of claims. I agree with the reasoning of Judge Claire of the District of Connecticut that in enacting Section 2735, Congress intended to make settlements of MCA claims final with respect to administrative review only, not with respect to judicial review of the construction and application of law. Welch v. United States, 446 F. Supp. 75, 78 (D. Conn. 1978). In attempting to discern Congress' intent, I attach greater weight to the 1972 Senate Report than to the 1964 letter. First the statement in the Senate Report was made later, in 1972, five years after the Supreme Court's holding in Abbott Laboratories v. Gardner, supra, that judicial review should be precluded only upon a showing of clear and convincing evidence of legislative intent to do so. Second, the official Senate Report is entitled to more weight than a letter to a committee Chairman. Finally, "the language of the Senate Report more directly addresses the issue of the 'purpose' of the legislation than does the passing remark in the above-mentioned letter." Welch, 446 F. Supp. at 78 n.5.

Id. at 226-27. Thus, neither the language nor the legislative history of the MCA preclude judicial review.

Further, this Court repeatedly held that there is a presumption that administrative decisions are subject to judicial review. In Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the Court stated:

> Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Board of Governors v. Agnew, 329 U.S. 441, 67 S. Ct. 411, 91 L.Ed. 408 (1947); Heikkila v. Barber, 345 U.S. 229, 73 S. Ct. 603, 97 L.Ed. 972 (1953); Brownell v. We Shung, 352 U.S. 180, 77 S. Ct. 252, 1 L.Ed.2d 225; Harmon v. Brucker, 355 U.S. 579, 78 S. Ct. 433, 2 L.Ed.2d 503 (1957); Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L.Ed.2d 210 (1958); Rusk v. Cort, 36 U.S. 367, 82 S. Ct. 787, 7 L.Ed.2d 809. Early cases in which this type of judicial review was entertained, [citations omitted], have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion. 5 U.S.C. § 701(a). The Administrative

> Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in court.' 5 U.S.C. § 704. The legislative material elucidating that seminal Act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedures Act's 'generous review provisions' must be given a 'hospitable' interpretation. Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S. Ct. 591, 99 L.Ed. 868. See United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); Brownell v. We Shung, supra; Heikkila v. Barber, supra. Barlow v. Collins, 397 U.S. 159, 166-167 (1970).

In Shaughnessy v. Pedreiro, 349 U.S. 49 (1955), the Court considered whether the word "final" in the 1952 Immigration and Naturalization Act, 8 U.S.C. § 1101 et seq., precluded judicial review of administrative decisions. The court reasoned that it was more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word "final" in the 1952 Immigration Act as referring to finality in administrative procedure, rather than as cutting off the right of judicial review in whole or in part. Id. at 51. This Court held that a presumption of

judicial reviewability can be overcome only by "clear and convincing evidence, precluding judicial review." Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985).

This Court, in a case involving 8 U.S.C. § 1160(e), has explained the presumption of judicial review of administrative decisions:

> It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative actions, see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670, 106 S. Ct. 2133, 2135, 90 L.Ed.2d 623 (1986), coupled with the limited review provisions of Section 210(e), it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.

McNary v. Haitian Refuge Center, 498 U.S. 499 (1991).

The Military Claims Act does not contain the kind of ambiguous language required by the Supreme Court to preclude judicial review. Furthermore, the Military Claims Act does not even contain language as clear as that analyzed in the Lindahl decision, which was held inadequate (emphasis added) to preclude judicial review. The Military Claims Act only states that decisions made thereunder are "final and conclusive," not that they are "not subject to review." See

also Panama Canal Co. v. Grace Line, 356 U.S. 309 (1958) (when the action or inaction [of the agency] turns on a mistake of law, then judicial relief is often available); Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1985) (legal errors are judicially reviewable); LaBash v. United States Navy, 668 F.2d 1153 (10th Cir. 1982) (constitutional violation is subject to judicial review).

Furthermore, judicial review of the Air Force's administrative decision-making is required under the Fifth Amendment's mandate that United States citizens be given equal treatment under the laws. Interpreting the Military Claims Act to preclude judicial review is a violation of this constitutionally protected right when analyzed with the Federal Tort Claims Act (FTCA). See 28 U.S.C. §§ 2671 et seq.

The equal protection doctrine requires that similarly situated citizens be treated similarly by the laws of the United States in Trustees of Dartmouth College v. Woodward, 17 U.S. 518, the Court held that a law which treats similarly situated persons differently based upon an arbitrary and capricious classification is unconstitutional. See Califano v. Boles, 443 U.S. 282 (1979); Flemming v. Nestor, 363 U.S. 603 (1960).

The MCA, in light of the FTCA, should be interpreted to provide judicial review of claims made under its provisions. The FTCA allows dependents, like Slaine Schneider, who have been injured by military personnel on military bases within the geographical boundaries of the United States, a determination of the merits of their claim in the federal courts. The FTCA does not, however, allow dependents injured on a United States military base outside the geographical boundaries of the United States to bring a claim under its provisions. For these dependents, the MCA, enacted prior to the FTCA, is the available remedial statute for which there is no rational reason to deny a judicial review of the merits of their claims.

Slaine Schneider, a girl who has been permanently injured at the age of 5 years, has not been provided with a neutral and independent review of her claims against the Air Force. Instead, she has been subject to the biased and inherently unfair system of the Air Force. This inherent unfairness results from the Air Force being the negligent and liable party as well as the adjudicating body who determines whether one of their own is responsible for the injury of another. This type of decision-making, made solely within the confines of the executive branch, precludes fair and just

rulings because there is no threat of review by the judicial branch of the government.

This Court, in the interest of justice and fairness, should grant Petitioner's writ of certiorari to determine whether judicial review is available under the Military Claims Act.

B. WHETHER THE UNITED STATES AIR FORCE ADMINISTRATIVE REVIEW OF SLAINE SCHNEIDERS' CLAIMS UNDER THE MILITARY CLAIMS ACT SEC. 10 U.S.C. §§ 2731 ET SEQ., VIOLATED SLAINE SCHNEIDER'S CONSTITUTIONAL RIGHT TO DUE PROCESS?

The appellate court acknowledged that judicial review of an MCA decision is required when a constitutional right has been violated. See App. 1A - 13A. The court, however, improperly determined that Slaine Schneider's constitutional rights had been violated thereby allowing judicial review of her claim. In Senior Circuit Judge Heaney's dissent, he states,

> The majority states that MCA provides an opportunity to file a complaint but that payment of a settlement is a discretionary even if negligence is shown. Its analysis precludes any due process challenge no matter how arbitrarily or improperly the complaint has been handled or disposed of. I do not believe that this is the "opportunity" envisioned by Congress when it established the complaint procedure under the MCA, particularly given the fact that the MCA is the

> exclusive remedy for claimants. The MCA provides compensation to persons injured in the course of medical treatment if they can show that their injuries resulted from negligence by the physicians involved. Due process requires that claimants be afforded fair procedures for presenting their claims of negligence.

App. 13A - 14A. It is the failure of the system to adequately provide a fair forum that requires a judicial review of its procedures.

A cause of action is a "species of property" protected by the due process clause. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1981) (citing Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950)). According to Justice Jackson writing for the Court in Mullane, "many controversies have been raised about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, the liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 313.[4] In Logan, the

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[4] One of the most famous and perhaps the most quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that by due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry, and

Supreme Court recognized that Mullane affirmatively settled that a cause of action is a species of property protected by the Due Process Clause. Id. at 428[5], see also Jiron v. Mahlab,

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renders judgment only after trial." Trustees of Dartmouth College v. Woodward, 17 U.S. 518.

[5] The Eleventh Circuit in Newman v. Soballe, 871 F.2d 969 (11th Cir. 1989), stated:

> [B]ecause the Military Claims Act does not confer any cause of action to non-military claimants as a substitute for a judicial remedy, we believe that the dissident's resolution of the case has constitutional implications. In Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed 2d 265 (1982), the Supreme Court held that "a cause of action is a species of property protected by the ... Due Process Clause." Thus having made access to the courts for judicial action such as tort or discrimination entitlement or necessity, that a government "may not deprive someone of that access unless the balance of [governmental] and private interest favor the governmental scheme." 455 U.S. at 430 n. 4, 102 S.Ct. at 1154-55. Because we find that the Gonzales Act does not deprive Ms. Newman of the right to sue in the United States Court, we need not undertake this constitutional inquiry. We note, however, that were we to adopt the dissident's position that

659 P.2d 311 (N.M. 1983) (holding statute unconstitutional where it denied claimants their Due Process court access). Likewise, the Military Claims Act creates a cause of action and allows claimants to pursue a claim against the United States Government for non-combative injuries suffered at the hands of United States personnel stationed overseas. See 10 U.S.C. §§ 2731 et seq.

An agency violates a claimant's constitutionally protected due process and equal protection rights when they act arbitrarily or capriciously. For example, arbitrary action occurs when claimants are denied the right to cross-examine witnesses. See Willner v. Committee on Character and Fitness, 373 U.S. 96. Or when they are denied access to the identity of witnesses and evidence that will be used against them. Goldberg v. Kelly, 397 U.S. 254. Or when they are denied the right to be personally be heard, not only through writing or others. Id.

Furthermore, a decision of an agency must meet the due process requirement that an agency's decision must

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> the Gonzales Act deprives Ms. Newman of any meaningful remedy, we would be forced to address the constitutionality of such a scheme.

Id. at n. 10.

express a reasoned conclusion. See Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). The findings must supply information and guidance to the parties involved and prevent arbitrary decisions. See In re Boston & P.R. Corp., 428 F.2d 159 (C.A. Mass. 1970). Courts have inherent authority to review and set aside administrative actions which are arbitrary or capricious. See McHenry v. Bond, 668 F.2d 1185 (11th Cir. 1982); Montessori Children's House & School, Inc. v. Secretary of Labor, 443 F. Supp. 599 (D.C. Tex. 1977). Under the Administrative Procedure Act, courts shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary and capricious, contrary to constitutional rights, unsupported by substantial evidence in any case reviewed on the record or unwarranted by the facts. See 5 U.S.C. §§ 654, 656, 659. The purpose of these provisions is to impose greater responsibility on the courts for the reasonableness and fairness of the decision of the administrative agency.

Slaine Schneider was not afforded due process protection in the manner in which the United States Air Force reviewed her claim brought under the Military Claims Act. The investigation which was conducted was completely inadequate in that the parents were never consulted for an interview regarding their version of the facts. Any physician

expert witness who reviewed Slaine Schneider's claim could not have legitimately concluded that there was no claim without taking into consideration the family's version of what occurred at the time of Slaine Schneider's medical treatment.

Slaine Schneider was also denied due process in the matter in that ex parte conversations were conducted with her subsequent treating physician. Slaine Schneider's counsel was not allowed to be privy to these conversations, nor was counsel provided any opportunity to respond to the claims. It is unknown whether Slaine Schneider's treating physician has any referral relationship with physicians affiliated with the United States Air Force in England, nor whether any other type of bias could have been shown through cross-examination or even rigorous interviewing techniques if Slaine Schneider would have been able to be represented by counsel. It is further a breach of the patient-physician privilege to have conducted an ex parte conversation with one of Slaine's treating physicians without her consent or knowledge.

Slaine Schneider's counsel was also denied the right to cross-examine or respond to the Air Force's expert witness. This witness's opinions were not even disclosed until the written decision denying Slaine Schneider's administrative appeal was issued. This decision did not

contain the basis of this expert witnesses' opinion in that there were no medical treatises cited, no references to the prevailing standard of medical care and no reference to the particular facts of Slaine Schneider's medical treatment. Furthermore, there was no manner in which Slaine Schneider could respond to these allegations as her administrative appeal had already been denied.

Clear evidence of the manner in which the Air Force violated Slaine Schneider's due process rights is seen in the manner in which they conducted the appeal. A mere nine days after the Schneider's appeal was initiated, the Air Force denied the claim and took final action. The Air Force never contacted Slaine Schneider through her counsel for additional information or informed them of the timing of the decision. Further, the Air Force could not have had the matter reviewed by a physician in nine days to determine the merits of the claims of negligence articulated in the expert physician's letter which was submitted at the time of the appeal. Because Slaine Schneider's access to federal district court was limited, the Air Force seized upon the opportunity to summarily dismiss the claim without adequate constitutional safeguards. Such actions warrant a further review by the federal judiciary and a finding of a violation of due process protection.

The arbitrary and capricious standard used by the United States Air Force is further evidenced in the its letter dated May 14, 1992. According to this letter, "At times, significant communication with Claimant's attorney is required. Other times, when the facts and expert medical reviews are unequivocal, protracted contact is not necessary....". This statement well illustrates the failure of the Air Force review process to afford constitutional safeguards to claimants such as Slaine Schneider.

CONCLUSION

For the reasons set forth above, Petitioners request that this petition for certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1702

Michael Schneider; Roisin Schneider, individually and as guardians of Slaine Schneider,	*	
Plaintiffs - Appellants,	*	Appeal from the United States District Court for the
v.	*	District of Minnesota.
United States of America,	*	
Defendant - Appellee.	*	

Submitted: December 16, 1993

Filed: June 24, 1994

Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

Michael and Roisin Schneider brought an action on behalf of their 5 1/2 year old daughter, Slaine Schneider, in the district court seeking review of a decision by the Untied States Air Force denying their claim for payment under the

Military Claims Act (the Act). See 10 U.S.C. § 2731-2737. The district court[1] dismissed the Schneiders' cause of action for lack of subject matter jurisdiction, finding that the language of the Act precludes judicial review. The Schneiders appeal, asking this court to determine that the Military Claims Act does not preclude judicial review of the denial of their claim and separately asserting that the procedure used by the United States Air Force in reviewing their claim violated their constitutionally protected rights to equal protection and due process. We affirm.

I. BACKGROUND

Slaine Schneider was born on April 23, 1987. In late 1988, while living in England with her parents where her father, Michael Schneider, was stationed with the United States Air Force (USAF), Slaine started to experience right ear drainage. Her parents took her to a hospital in England for treatment. In 1989, a USAF physician, Dr. David Range, performed three surgical procedures on Slaine's ear: (1) a myringotomy, which involved placing a tube in Slaine's right ear to facilitate drainage; (2) removal of a polyp from the right ear; and (3) a modified radical mastoidectomy, diagnosed postoperatively as cholesteatoma. The Schneiders contend that before Dr. Range performed the third surgery, he advised the Schneiders that he had never seen or performed the procedure but assured them that he would have available a more experienced physician at the time of surgery. The Schneiders assert that to the contrary, a more experienced physician was not present at the time of surgery. In 1990, Dr. William S. Lund, a civilian doctor in England, performed a fourth surgery for recurrent cholesteatoma, and

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[1]The Honorable Diana E. Murphy, Chief Judge, United States District Court for the District of Minnesota.

his operative report indicated that much of the ear drum was eroded. Today, Slaine suffers deafness in her right ear, which her parents claim results from the negligence of the USAF physician's failure to diagnose the cholesteatoma sooner and failure to properly treat the ear drainage.

On Slaine's behalf, in July of 1991, her parents filed a claim with the USAF pursuant to the Military Claims Act, alleging personal injury to Slaine as a result of the negligence of the USAF physician. ON November 13, 1991, Captain Tamara Riley, a USAF Judge Advocate Officer stationed in Europe and assigned to do a "medicolegal review" of the claim, notified the Schneiders of how the claim process could be expected to proceed. In the letter, Captain Riley said that she would review the case within 45 days, consult with medical experts, and then forward the file to the Air Force's legal services agency at Bolling Air Force Base in Washington, D.C., for final disposition, and notify the Schneiders when the transfer occurred. Captain Riley also informed the Schneiders that they bore the burden of proof and requested that the Schneiders obtain a current audiology examination of Slain in order to substantiate their claim for total and permanent loss of hearing.. (Jt. App. at 24.) On January 13, 1992, Captain Riley notified the Schneiders that she had completed her "medicolegal review' and was forwarding the file to Washington D.C., for final disposition. She again suggested that the Schneiders forward the audiology report as soon as possible to the reviewing officer in Washington. (Id. at 26.) By letter dated March 16, 1992, the Schneiders' attorney submitted the audiology report to the reviewing authority in Washington and asked what information was needed to complete the investigation. (Id. at 27.) By letter dated the next day, the USAF notified the Schneiders of the final disposition of their claim. (Id. at 28-

29.) The USAF denied the claim, finding no negligence in the care Slaine received from Dr. Range. (Id.)

The Schneiders filed an administrative appeal pursuant to the regulations, requesting that the USAF reconsider their claim. On appeal, the Schneiders, for the first time, submitted the written opinion of their expert, Dr. George Sisson, Sr., who concluded that Slaine had received negligent care from the USAF physician. (Id. at 30-44.) Dr. Sisson's opinion referred to Dr. William S. Lund, the physician who had subsequently treated Slaine, as a well-known British neurotologist and cited Dr. Lund's findings as a basis for Dr. Sisson's opinion. (Id. at 42-43.) Colonel Philip A. Meek, Chief of the Air Force's Claims Division, considered the Schneiders' appeal and Dr. Sisson's expert report. Noting that the Schneiders' expert quoted Dr. Lund, Colonel Meek, in his letter of denial, stated that the Air Force had extensively interviewed Dr. Lund in the course of investigating the claim. Captain Riley had previously informed the Schneiders that as a part of her investigation of the claim she would consult with experts. In the USAF interview, Dr. Lund concluded that Dr. Range's treatment was not negligent and that Slaine's present condition was a result of the disease process, not medical negligence. (Id. at 45.) The medical facts of the case were also reviewed by a USAF medical expert who concluded that the diagnosis was timely and the surgery was appropriate. (Id. at 46.) Colonel Meek concluded that he was unable to approve the claim for payment because there was no showing of negligent treatment. (Id.)

The Schneiders then filed an action in district court seeking review of the USAF's decision. They alleged jurisdiction as a federal question under 28 U.S.C. § 1331 and the Military Claims Act, 10 U.S.C. § 2731-2737; as a tort

claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680; as a controversy under the Declaratory Judgment Act, 28 U.S.C. § 2201; and as a constitutional claim of due process and equal protection under the Fifth Amendment. The district court found that there was no jurisdiction under the FTCA because the United States has not waived its sovereign immunity for claims arising in a foreign country. See 28 U.S.C. §2680(k). The district court determined that there was no jurisdiction under the Declaratory Judgment Act because it only creates a remedy and cannot serve as an independent basis for subject matter jurisdiction. See 28 U.S.C. § 2201. The district court also determined that there was no federal question under 28 U.S.C. § 1331 because the denial of a settlement is unreviewable by the terms of the Military Claims Act, see 10 U.S.C. § 2735, and the Schneiders had not raised any valid constitutional claim. Accordingly, the district court dismissed the action for lack of jurisdiction and failure to state a claim upon which relief may be granted. The Schneiders appeal.

II. DISCUSSION

In general, the Military Claims Act allows for settlement of two types of personal injury claims:

> (a) claims arising from negligent or wrongful acts or omissions committed by United States military or civilian personnel while acting within the scope of their employment.
>
> (b) claims arising from noncombat activities of the United States, whether or not such injuries or damages arose out of the negligent or wrongful acts or omissions by United States military or civilian employees . . .

32 C.F.R. § 842.49(a), (b) (1990); see also 10 U.S.C. § 2733(a). For claims arising from noncombat activities, it is not necessary to establish negligence. See 32 C.F.R. § 842.49(b). "Noncombat activity" is a specially defined term in the department's regulations; it is an "[a]ctivity, other than combat, war or armed conflict, that is particularly military in character and has little parallel in the civilian community." 32 C.F.R. § 842.49(a). When the Secretary is satisfied that a claim of negligence has been substantiated, the Secretary "may settle" the claim by paying an amount not to exceed $100,000, and for a larger claim deemed meritorious by the Secretary, the Secretary may report the excess amount to the Comptroller General for payment. See 10 U.S.C. § 2733.

The Schneiders' claim arose from the acts of a USAF employee (Dr. Range) acting within the scope of his employment. The USAF denied the claim, finding no negligence, and the district court dismissed their complaint for lack of jurisdiction and failure to state a claim. On appeal, the Schneiders offer tow arguments to support their contention that the district court has jurisdiction to consider their complaint. First, the Schneiders contend that the Military Claims Act does not preclude judicial review of the USAF's denial of their claim. Second, they contend that the USAF violated their rights to equal protection and due process. We consider each argument in turn.

A. Military Claims Act

The Schneiders argue that the district court erred in determining that it lacked jurisdiction because the USAF's decision to deny their claim is a federal question under the Military Claims Act and is subject to judicial review as final agency action. This court reviews de novo a district court's determination that it lacks subject matter jurisdiction. See

General Elec. Capital Corp., 991 F.2d 1376, 1380 (8th Cir. 1993); Keene Corp. v. Cass, 908 F.2d 293, 296 (8th Cir. 1990).

The settlement of a claim under the Military Claims Act, which includes the Military's disposing of a claim by disallowance, see 10 U.S.C. § 2731, is final agency action. Ordinarily, the Administrative Procedure Act (APA) provides a general cause of action for persons adversely aggrieved by final agency action, see 5 U.S.C. § 702, but there is no cause of action to the extent that a relevant statute precludes judicial review, see 5 U.S.C. § 701(a)(1). See Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984) To determine whether the relevant statute precludes judicial review:

> We begin with the strong presumption that Congress intends judicial review of administrative action. . . .
>
> . . . .
>
> Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and "like all presumptions used in interpreting statutes, may be overcome by," inter alia, "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme."

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-73 (1986) (quoting Block, 467 U.S. at 349, 351).

To preclude judicial review, a statute must be "'specific in withholding such review [or] must upon its face give clear and convincing evidence of an intent to withhold it.'" Bowen, 476 U.S. at 671 (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946)); see also Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967).

The relevant section of the Military Claims Act provides: "Notwithstanding any other provision of law, the settlement of a claim under section 2733 . . . of this title is final and conclusive." 10 U.S.C. § 2735. The Schneiders argue that this statutory language does not clearly preclude the presumption in favor of judicial review but merely provides that no further agency action or review is available. To the contrary, section 2735 is clear on its face. The statute does not merely say that the agency decision is "final," see Shaughnessy v. Pedreiro, 349 U.S. 48, 51-52 (1955) ("final" only prevents further administrative review), or "final and conclusive," see Lindahl v. Office of Personnel Mgmt., 470 U.S. 768 (1985) ("final and conclusive" precludes judicial review only of agency fact-finding). Rather, the statute states that the Secretary's decision is "final and conclusive" "notwithstanding any other provision of law." 10 U.S.C. § 2735. To interpret the section as precluding only further administrative review would be to render meaningless the phrase "notwithstanding any other provision of law." Additionally, section 2735 originally stated that the military's settlement of a claim is "final and conclusive for all purposes," but the words "for all purposes" were subsequently "omitted as surplusage." Rodrigue v. United States, 968 F.2d 1430, 1433 (1st Cir. 1992) (quoting 10 U.S.C.A. § 2735 (Explanatory Notes)). We conclude that the language of section 2735 clearly expresses Congress's intent to preclude judicial review and presents no ambiguity

that would give rise to a presumption in favor of judicial review.

Among other circuits, "[i]t is well-recognized that the administrative claims procedure is an appropriate balance between individual rights and Congress' desire to avoid the disruptive effect that judicial review may have on 'the prompt and authoritative administrative settlement of claims' against the military." Heller v. United States, 776 F.2d 92, 98 (3d Cir. 1985) (quoting Towry v. United States, 459 F. Supp. 101, 108 (E.D. La. 1978), aff'd, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981)), cert. denied, 476 U.S. 1105 (1986). Every circuit that has addressed the language of section 2735 has concluded that it precludes judicial review of the military's disallowance of a claim under the Act, absent a constitutional claim. See Hata v. United States, No. 92-56142, 1994 WL 145108, at *1 (9th Cir. Apr. 26, 1994); Rodrigue, 968 F.2d at 1432-34; Poindexter v. United States, 777 F.2d 231, 233-37 (5th Cir. 1985); Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983); LaBash v. United States Dept. of the Army, 668 F.2d 1153, 1155-56 (10th Cir.), cert. denied, 456 U.S. 1008 (1982). But see Welch v. United States, 446 F. Supp. 75, 77-78 (D. Conn. 1978) (suggesting broad judicial review). We now join our sister circuits in holding that section 2735 is unambiguous and that absent a constitutional claim the disallowance of a claim under the Military Claims Act is not subject to judicial review.

B. Constitutional Claims

Our next task is to determine whether the Schneiders' allegations of equal protection and due process violations state any valid constitutional claim that would justify judicial review of this case. The Schneiders first contend that the

Military Claims Act deprives them of their right to equal protection under the Fifth Amendment because it precludes judicial review while similarly situated litigants under the FTCA are entitled to bring suit. The Schneiders have no cause of action under the FTCA because it excludes from its remedial scheme a cause of action for a governmental tort committed in a foreign country. See 28 U.S.C. § 2680(k). Because the government has not waived its sovereign immunity when a tort is committed in a foreign country, the Schneiders' only remedy lies within the scheme of the Military Claims Act, which precludes judicial review of the settlement or disallowance of a claim. Thus, the Schneiders contend, the Military Claims Act deprives them of equal protection. We disagree.

First, Congress's power to maintain or to waive sovereign immunity for suits against the government is absolute and is inherent in the government's status as a sovereign. Lynch v. United States, 292 U.S. 571, 574 (1934); Heller, 776 F.2d at 98. Second, the Schneiders have not alleged that they are members of a protected class, and in our view, the distinction between victims within the United States and victims in a foreign country is a rational distinction. See Heller, 776 F.2d at 98 ("government's desire to avoid application to it of the vagaries of foreign law is an important and rational consideration"). We conclude that, because Slaine's injury occurred in a foreign country, the Schneiders are not similarly situation to persons injured by governmental torts within the United States and that this distinction is rational. Therefore, the Schneiders' equal protection challenge fails.

The Schneiders also contend that the USAF violated their right to due process because the USAF conducted ex parte communications with experts without giving the

Schneiders an opportunity for cross-examination, failed to timely inform the Schneiders of the substance of those expert opinions, and failed to contact the Schneiders for additional information or to inform them of the timing of the decision. It is a well-settled principle, however, that the requirements of procedural due process apply only when there has been a deprivation of life, liberty, or property within the meaning of the Fifth or Fourteenth Amendment. See Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972); Williams v. Nix, 1 F.3d 712, 717 (8th Cir. 1993). Not every "grievous loss visited upon a person by the [government] is sufficient to invoke the procedural protections of the Due Process Clause." Meachum v. Fano, 427 U.S. 215, 224 (1976). The relevant consideration for our analysis is a two-part inquiry. We must determine (1) whether the Schneiders were deprived of a protected interest, and if so, (2) what process was due. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Post v. Harper, 980 F.2d 491, 493 (8th Cir. 1992).

The Schneiders argue that they were deprived of a cause of action by the Military Claims Act's preclusion of judicial review. We recognize that a cause of action is a property interest protected by the Due Process Clause. See Logan, 455 U.S. at 428. However, the Military Claims Act does not grant claimants a cause of action against the government. See Towry, 459 F. Supp. at 105 (Military Claims Act confers no right of action to pursue judicial remedy) (opinion adopted by Fifth Circuit on appeal). Further, as already noted, the government has not waived sovereign immunity for tort claims against the government that arise in a foreign country. See 28 U.S.C. § 2680(k). Thus, the Schneiders have no cause of action against the government, and as a result, preclusion of judicial review by the Military Claims Act does not deprive them of a cause of

action. See Heller, 776 F.2d at 98 (exclusivity of a remedy under the Military Claims Act is not itself a denial of due process). See also Hata, 1994 WL 145108, at *2 ("preclusion of judicial review under the [Military Claims Act] does not violate due process").

The Schneiders cannot claim that they were deprived of a property interest on the ground that they were entitled to a settlement under the Military Claims Act. In Roth, the Supreme Court discussed what constitutes a property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. The scope of the Schneiders' interest in a settlement is a defined by the Military Claims Act and the applicable regulations that define a person's eligibility for settlement. The Act and its regulations create an opportunity to file a claim for settlement, not an entitlement to payment of a benefits. A settlement under the Act is not in the nature of an entitlement but is conditioned upon both the claimant's ability to substantiate a negligence claim and the USAF's discretion in determining whether to pay a settlement. We conclude that, because the Schneiders have not demonstrated that the USAF deprived them of a liberty or property interest

by denying settlement of their claim, the Due Process Clause does not apply. Therefore, we do not reach the question of what process was due.

III. CONCLUSION

We conclude that the Military Claims Act is not subject to judicial review absent a constitutional claim and that the Schneiders have failed to demonstrate a valid constitutional claim in this case. Accordingly, we affirm the judgment of the district court dismissing the case for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

HEANEY, Senior Circuit Judge, dissenting.

I agree with the majority that no equal protection violation occurred and that there is no judicial review of Military Claims Act (MCA) determinations absent a constitutional claim. I conclude, however, that the MCA does confer an entitlement to a settlement upon a showing of negligence and therefore due process requires fair procedures to determine negligence. Absent such procedures, the promise of benefits to those who are injured by the negligence of the military is a sham.

The majority states that MCA provides an opportunity to file a complaint but that payment of a settlement is a discretionary even if negligence is shown. Its analysis precludes any due process challenge no matter how arbitrarily or improperly the complaint has been handled or disposed of. I do not believe that this is the "opportunity" envisioned by Congress when it established the complaint procedure under the MCA, particularly given the fact that the MCA is the exclusive remedy for claimants. The MCA provides

compensation to persons injured in the course of medical treatment if they can show that their injuries resulted from negligence by the physicians involved. Due process requires that claimants be afforded fair procedures for presenting their claims of negligence.

Cases from other circuits have acknowledged the possibility that review of an MCA claim is available when a failure of due process is implicated. The MCA "may well permit some limited review, for example where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination." Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983) (quoting Scroggins v. United States,, 397 F.2d 195, 197 (Ct.Cl), cert. denied, 393 U.S. 952 (1968)) (internal quotations omitted); See also Hata v. United States, No. 92-56142, 1994 WL 145108, at *2 (9th Cir. Apr. 26, 1994) (noting Scroggins quoted in Lindahl v. Office of Personnel Management, 470 U.S. 768, 791 (1985)); Rodrigue v. United States, 968 F.2d 1430, 1432 (1st Cir. 1992) (same); LaBash v. United States Dept. of the Army, 668 F.2d 1153, 1156 (10th Cir.) (suggesting failure to comply with statutory process would constitute due process violation), cert. denied, 456 U.S. 1008 (1982).

I believe that a substantial departure from important procedural rights has occurred in this case. i would agree that the Air Force may use a process that consists entirely of written submissions by the parties. If, however, the Air Force departs from the written process and interviews one of the actors, fairness requires that the claimant also be given an opportunity to question that person. According to the final letter denying the Schneiders' appeal, the Air Force "extensively interviewed" Dr. Lund about the medical

treatment received by Slaine Schneider and about the opinion of the Schneiders' medical expert, Dr. Sisson, that such treatment was negligent. The Schneiders should have been provided an equal opportunity to question Dr. Lund to explore the basis of his opinion. This is particularly important given the fact that the Air Force is not a neutral or independent adjudicator but rather is investigating one of its own physicians. The Air Force deprived the Schneiders of dupe process when it failed to afford them that opportunity.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Michael Schneider and Roisin Schneider, individually and as guardians of Slaine Schneider,

Plaintiffs,

Civ. No. 4-92-823

v.

United States of America

MEMORANDUM OPINION AND ORDER

Defendant.

Martha L. Neese, Esq., Lyons Sawicki Neese P.A., 1560 Beam Avenue, Suite A, St. Paul, Minnesota 55109, appeared for the Plaintiffs.

Jeffrey L. Karlin, Esq., United States Department of Justice, Civil Division Torts Branch, Benjamin Franklin Station, Washington, D.C. 20044, and Robert Small, Esq., Assistant United States Attorney, Minneapolis, Minnesota, appeared for the United States of America.

Michael Schneider and Roisin Schneider, both individually and as guardians of their daughter, Slaine Schneider, brought this action against the United States of America. The complaint alleges jurisdiction under the

Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 and 2671 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201, and under the Military Claims Act, 10 U.S.C. §§ 2731 et seq. and 28 U.S.C. § 1331. Plaintiffs claim that Slaine Schneider suffered permanent hearing loss as a result of negligent health care provided to her at the United States Air Force Hospital located in Great Britain. The government now moves to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

I.

Slaine Schneider was born on April 23, 1987. In 1988, she lived in England with her parents. Michael Schneider was stationed there with the United States Air Force (USAF).

In late 1988, Slaine Schneider started to experience right ear drainage. On December 28, 1988, she was brought

to the USAF hospital in Upper Heyford, England for treatment. She continued to receive treatment at this hospital for her ear problem.

Dr. David Range, a doctor at the USAF hospital, performed surgery on Slaine Schneider's ear on three separate occasions. On June 26, 1989, he performed a myringotomy, which involved placing a tube in the tympanic membrane to facilitate drainage. On october 24, 1989, he removed a polyp or growth in her right ear. During this surgery, he perforated the tympanic membrane. Finally, on November 16, 1989, Dr. Range performed a modified radical mastoidectomy. Range had told the parents that he had never performed this surgery before, nor seen it performed. He assured them that he would be assisted by a surgeon more experienced in this procedure, but no more experienced surgeon did assist him.

Following the third operation, Slaine Schneider was diagnosed with a cholesteatoma, which had eroded through

bone and her posterior canal. On December 15, 1990, Slaine Schneider had a fourth surgery at a civilian hospital for a recurrent cholesteatoma. At this surgery, it was observed that she had lost much of her right eardrum.

On July 2, 1991, Michael Schneider brought a claim under the Military Claims Act. 10 U.S.C. § 2733. As part of its investigation of this claim, the government requested an audiology examination of Slaine Schneider on November 13, 1991. By letter dated November 26, 1991, Schneider informed the government that he had requested an audiological examination, but that it was difficult to obtain one because the family had been restationed in Italy. the government again requested the audiology examination in January 1992.

Schneider forwarded the results of an audiological examination on March 16, 1992. The government denied the claim on March 17, 1992. On May 5, 1992, Schneider appealed, and filed an expert opinion letter prepared by Dr.

George Sisson with the appeal. On May 14, 1992, the appeal was finally denied in a letter indicating that no further administrative action could be taken.

Michael and Roisin Schneider brought this action on September 2, 1992. They seek a declaration that the defendant improperly conducted its administrative review, and erroneously denied payment, in violation of their right to due process under the Fifth Amendment. They also pray for the court to remand to the Air Force for further administrative action, and to be allowed to go forward to liquidate damages. The government now moves to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

II.

The complaint alleges jurisdiction under 28 U.S.C. § 1346(b). The FTCA does not waive sovereign immunity for claims arising in a foreign country. 28 U.S.C. § 2680(k).

The Schneiders' claims arose in Great Britain, and plaintiffs do not argue that the foreign country exception to the FTCA does not apply. The FTCA does not provide a basis for subject matter jurisdiction in this action.

The complaint also alleges jurisdiction under the declaratory judgment act. 28 U.S.C. § 2201. The act creates a remedy "[i]n a case of actual controversy within its jurisdiction..." It does not, however, provide a separate basis for subject matter jurisdiction.

Finally, the complaint alleges federal question jurisdiction under 28 U.S.C. § 1331 to review the denial of the Schneider's claims under the Military Claims Act. The government argues that the denial of claims under the Military Claims Act are generally unreviewable. The act expressly provides that "[n]otwithstanding any other provision of law, the settlement of a claim under section 2733 . . . or this title is final and conclusive." 10 U.S.C. § 2735. The act further defines a settlement to include the disallowance of

a claim. 10 U.S.C. § 2731. Plaintiffs respond that final agency actions are presumptively reviewable unless it is clear that Congress intended otherwise. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

The Military Claims Act generally disallows judicial review of the denial of a claim. See Rodrigue v. United States, 968 F.2d 1430 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); Broadnax v. United States Army, 710 F.2d 865 (D.C. Cir. 1983); LaBash v. United States Dept of the Army, 668 F.2d 1153 (10th Cir. 1982) cert. denied, 456 U.S. 1008 (1982).[1] Review may be available under the act, however, if there is a "a sufficiently pleaded allegation that a cognizable constitutional right has been violated." LaBash, 668 F.2d at 1155. See also Broadnax 710 F.2d at 867 (review available when there is "substantial departure from important procedural rights");

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[1]One district court has held to the contrary. See Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978).

Rodrigue, 968 F.2d at 1434 (same). There is subject matter jurisdiction, then, only if plaintiffs have pleaded a cognizable constitutional claim.

III.

In their brief, but not in their complaint, plaintiffs claim that the administrative process denied them due process in violation of the fifth amendment in four ways. The government did not interview the plaintiffs or their daughter in its investigation of the claim. The government did not give plaintiffs sufficient time to have the audiological examination done. The government did not seek re-review on the basis of the appeal. The government interviewed Slaine's civilian physician without allowing plaintiffs to participate in the interview or cross-examine the doctor.

The plaintiffs have not identified either a protected property or liberty interest deprived without due process. See Wolf v. McDonnell, 418 U.S. 539, 556-57 (1974); Vitek v. Jones, 445 U.S. 480, 489-90 (1980). The government has

not waived it sovereign immunity with regard to plaintiffs' claim. Moreover, the complaint does not allege that either the Military Claims Act or the regulations promulgated thereunder create a protected property or liberty interest.

Even if there were a sufficiently alleged protected property or liberty interest, plaintiffs have not alleged facts which show they were afforded insufficient process. Even viewing the facts in the light most favorable tot he plaintiffs, as the court should at this stage, the government reviewed and investigated their claims and their appeal. It afforded plaintiffs the opportunity to submit any information relevant to the claim, and twice specifically requested the results of an audiological examination. Plaintiffs have not alleged facts sufficient to show that the claim was given insufficient process.

Plaintiffs also allege that the FTCA deprives them of equal protection because it distinguishes between claims arising in the United States and those arising overseas. The

distinction between these class is rational, and the statute does not effect any suspect class. Zobel v. Williams, 457 U.S. 55 (1982). The complaint fails to state a cognizable equal protection claim.

The complaint does not allege any cognizable constitutional claim. The government's motion to dismiss should therefore be granted.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that the motion to dismiss of the United States of America is granted and the complaint is dismissed.

Date:

Diana E. Murphy
United States District Judge

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20332-6128

Martha L. Neese, Esquire
Lyons, Sawicki & Neese
1560 Beam Ave., Suite A
St. Paul, Minnesota 55109

Re: Medical Malpractice Claim of Slaine and Michael J. Schneider -
OD/C/XQDT/91/00527/NOM

Dear Ms. Neese

I have considered your clients' claim under the provisions of the Military Claims Act, 10 U.S.C. § 2733, alleging negligence by Air Force medical personnel at RAF Upper Heyford Hospital, during the performance of a modified mastoidectomy to remove cholesteatoma in Slaine's right ear. Following a thorough review of the facts and the law, I must deny their claim.

The reason for this decision is that there was no breach in the standard of care in the treatment Slaine received at our facility. This case was extensively reviewed by an ENT expert, and in his opinion the surgery was appropriately performed. Recurrent cholesteatoma with multiple surgeries for its eradication are not uncommon, due to the aggressiveness of the disease, especially in children. Thus, contrary to your clients' allegations, the fact that the cholesteatoma recurred was not due to medical malpractice.

Your clients' also alleged that Dr. Range had never performed or seen the surgery to remove a cholesteatoma. Please be advised that Dr. Range is board certified in Otolaryngology and Head and Neck Surgery. He has performed this surgery on many occasions and is well-qualified to do so.

The Air Force regrets any hearing loss Slaine may have suffered as a result of her disease, however, without evidence of negligence the claim cannot be paid.

If your clients are dissatisfied by this decision, they may file an administrative appeal. No special form is required, but the appeal should be in writing and received within sixty days of the mailing of this letter. The appeal should include any additional information which will substantiate the claim and should be sent to:

AFLSA/JACC
Building 5683
Bolling AFB, DC 20332-6128

Sincerely

SHERRI W. JOHNSON, Lt Colonel, USAF
Chief, Tort Branch
Claims & Tort Litigation Division
Air Force Legal Services Agency

May 5, 1992

Lyons Sawicki & Neese
1560 Beam Ave., Suite A
St. Paul, MN 55109
Attn: Ms. Martha Neese

RE: Slaine Schneider
File No. 3218

I have reviewed the records your office sent me which originally were provided to you by the U.S.A. hospital, RAF Upper Heyford, England; also the chronological summary provided beginning with the first mention of a right otorrhea on December 28, 1988. This was described for by Dr. Diane Jordan-Wagner as an infant with greenish-brown pus draining from the right ear. The drum membrane was described as thick and red and the patient was placed on antibiotic otic eardrops and analgesics for pain. The patient was then seen five more times in the Pediatric? outpatient department and antibiotics were rotated and there was a report of one culture. A note states that it was sensitive only to tetracycline and because of the concern of stain to the teeth, Dr. Jordan-Wagoner elected not to give tetracycline. The ear continued to drain a foul-smelling, green pus for four more months. Patient was referred to Dr. David Range, the chief of the Otolaryngology clinic. After this consultation, tetracycline was ordered. Notes reveal there was some diminution of the discharge, but clinical notes of 4/21/89 state that discharge turned to polypoid granulation and medications were continued.

On 5/9/89 all medicines were discontinued the clinical note state that there was lessening of the granulation in the right ear. Within a month, on 6/5/89 there was again reported

drainage in the right ear and the chart states that there was probable perforation. Patient considered for surgery and plan was to place a polyethylene tube in the middle ear. Dr. David Range took charge of the case and his operative record of 27, June, 1989 states "right chronic otitis media in ear, this was chronic serous otitis." Hospital chart stated that the patient was two-year old, white female with chronic otitis media on the right side (ongoing infection) and right-sided external otitis with granulation tissue in the external canal. It stated the proposed surgery was placement of a tympanostomy tube, removal of the granulation tissue in the external canal and a procedure on her hand involving removal of warts.

Description of the operation states a Donaldson-type tympanostomy plastic tube was placed into position without difficulty and after that, cup forceps was used to remove the granulation tissue from the external canal. Patient tolerated the procedure well, and while the recovery room notes are not clear (excessive xeroxing) it would appear that the patient returned to her room in good condition. Patient was seen about two weeks post-operatively in the outpatient clinic on 7/6/89 by Dr. David Range and notation was: no problems or drainage. Examination note states: moist and TM - tympanic membrane, was opaque, no evidence of granulation. At this time, or shortly thereafter parents did rase a question as to what was the laboratory analysis of the granulated tissue. They could find no evidence that the pathological examination was carried out at this time.

Dr. Range saw the patient on 7/21 and noted "there was a good PE tube, the warts were gone." However, five days later, a Dr. W. Preston Woodall saw the patient as an emergency at which time she was complaining of drainage from the right ear. The PE tube was in place with purulent

drainage and diagnosis of otitis media was made and the patient was treated with Bactrim. Patient was then not seen again until 8/29, a month later, when Dr. David Range made a notation that the patient had a right otitis externa, plus serous otitis media and a question of otitis media. Started the patient on Cortisporin and continued the Ceclor. Patient was again seen by Dr. Range on 9/7/89 at which time he noted the PE tube had been rejected after approximately two months. His notation states that there was no discharge and his diagnosis at that time was right otitis media. On 10/6/89, a month later, Dr. Range examined the patient and made a notation that patient had a resolving serous otitis media and discontinued all medication. Patient again seen on 10/17/89 because of recurrent drainage and the notation said it is probably a polyp. Diagnosis at that time was right otitis media and/or otitis externa. The possibility of surgery was most likely discussed and then because the patient reported to the hospital on 10/24/89 for an examination under anaesthesia which was performed the next day by Dr. Range. The intent was to remove a polyp which was not seen, according to the physical examination, which states "no visible perforation or polyps seen." At that time they thought the tympanic membrane was in normal position and without perforation. The operative report however, states that they did remove a polyp and placed an oto-wick into the canal and the op report further states that "there was a perforation of the posterior aspect with large amount of edema and thickening of the posterior tympanic membrane with cellular debris and polyp formation (possible cholesteatoma)." <u>This is the first note with the possibility of a cholesteatoma</u>. (The reviewer G.A.S. - believes this was the point in time there was confusion among the A. Force attendings as to what should be done next.)

Next note: 10/27/89 - by Dr. Range noted that "there was edema in the canal, a tympanic membrane perforation posteriorly with drainage, plus a polyp, plus debris (possible cholesteatoma)." At that time the culture was pending. Diagnosis was "tympanic pus with drainage long-term questioning cholesteatoma. Continue meds??"

The next day on 10/28/89 Dr. Steven Walker raised the question in regard to surgery, with Dr. Range. He was evidently asked to call the patient and explain to them the ear surgery?? Notes are not clear whether Dr. Steven Walker was an M.D. since later they talk about Sgt. Walker explaining to the patient.

On 10/30/89 - by Dr. Range states "resolving otitis externa and otitis media but that patient may still need a mastoid operation. "It concludes by saying continue meds, follow-up in four days.

On 11/3/89 the note says that "questioning the possibility of cholesteatoma see (sic) Dr. Sokol for evaluation of mastoidectomy."

On 11/7/89 evidently Dr. Donald Sokol, an otologist? did see the patient and made a notation that posterior half of the right tympanic membrane was absent and that there was probably in this perforated area a cholesteatoma. Further states mastoiditis, rule out cholesteatoma, congenital. Needs exploratory right ear in mastoid and mastoidectomy.

Ten days later (11/17/89) the patient was admitted for chronic serous otitis media with a suspected right cholesteatoma. A right modified, radical mastoidectomy was performed by Dr. David Range. It was "a type III tympanoplasty (perforation remains and long process of the stapes remains). Massive

cholesteatoma found eroded through the posterior canal wall." Patient was instructed to keep ear dry.

The pathology report of the specimen at that time which was called a polyp was reported 1. Polyp specimen from right ear: fragment of fibrous tissue with severe, chronic inflammation and detached keratinous, squamous consistent with part of the cholesteatoma. 2. Cholesteatoma, right ear, largely keratinous, horny cells consistent with part of a cholesteatoma.

There is a follow-up that the patient on 11/22/89 had an episode of vomiting, plus yellowish drainage from the right ear. The records provided were very difficult to read.

On 11/30/89 Dr. David Range noted "Right tympanomastoid done two weeks ago. Modified radical mastoidectomy, long process, plus stapes intact. No drainage, no pain.

On 12/15/89 Dr. David Range "Follow-up of right tympanomastoid, no drainage, packing nearly done. TM discharge was perforated T.M." (This is inconsistent because on the same day he says there is no discharge and then he states that there is a tympanic membrane discharge with perforated T.M.)

On 1/5/90, clean mastoid bowl, healing well, 20% perforation of the tympanic membrane. There is a note the tympanomastoid not reconstructed) (stapes/molen (sic) stapes/malleus long process intact, discontinue meds in two months).

Patient seen again on 3/15/90. Note says good post-operative course follow-up in two months.

Next notation - 5/22/90 - Dr. David Range note states: external otitis media, bowl infection secondary to wax. Cortisporin given. Return in 10 days if drainage recurs, otherwise three months if okay.

Note on 7/12/90 with Dr. Suzanne (sic). "Parents note drainage from ear, have been putting in drops; right ear canal has white drainage.

On 8/31/90 Dr. James Demetroulakos: "Has foul-smelling drainage, has been cleaned every two months."

Seen again in September 1990. Exact date is not recorded on my sheet. "Improvement in drainage. Decreased otorrhea."

On 10/4/90 - by Dr. Sokol - "Has infection and squamous debris in the right ear. Mastoiditis with cholesteatomatous debris." ON the same date Dr. Demetroulakos has a notation "Have explained our roles in regard VII damage and hearing. Have reviewed CT scans. Will schedule surgery November 7, 1990."

Next notation - can't tell what it was, but its date is unknown; a Dr. Carol Lyons states some vomiting, yellow-green nasal discharge. States will have secondary mastoidectomy on 11/7/90. Ear is full of dull bullous debris, diagnosis is right cholesteatoma.

On 10/9/90 - by Dr. Carol Lyons "Follow-up for cholesteatoma which has already had two surgeries and one exam under anesthesia nad is due to have another real soon."

At this point the Army records stop and evidently the patient went to an outside consultant, Mr. W. S. Lund, a well-known

British neurotologist who took over the management of the case and operated on December 15, 1990. Stated in a letter to Dr. Demetroulakos, dated December 20th that he explored the ear in the Acland Hospital, Oxford, via a post-auricular incision. He further states "there was an extensive recurrence of the cholesteatoma which involved the entire original surgical mastoid cavity which had been operated on one year ago. The disease occupied the entire upper half of the middle ear. There was a very large epitympanic cell which was filled with matrix and debris and the lesion extended anterior and inferior into the pro-tympanum and beginning to go into the eustachian tube. Virtually the whole of the ear drum had gone except for a very narrow rim. The posterior crua of the stapes was absent with the remainder of the stapes superstructure not attached to the footplate, but the latter was present in the oval window niche. Neither the tegmen nor the horizonal portion of the facial nerve were eroded."

The incus and the head of the malleus had been excised at the original operation and only a thin stump of the malleus was present. The tensor tympani was also exposed by the cholesteatoma matrix. A large nerve was seen passing across the promontory which looked at first like the tympanic nerve, but was probably the chorda tympani, which had been pressed against the interior wall of the middle ear by the huge cholesteatoma.

In view of the extensive destruction of the middle ear structure, there was no hope of doing any reconstructive procedure to help Slaine's hearing and had to contend myself by doing a radical mastoidectomy. He further stated that he believed he had removed all of the disease and following this 4 1/2 hour operation, the cavity looked "nice and clean." He did remove the remains of the malleus and the stapes and he cleaned out the eustachian tube as far as he could possibly do

by burring the region, and he deliberately obliterated it by burring the region and filling it with bone chips and surgicel. The cavity was grafted and then a generous meatoplasty performed with the cavity being filled with many rayon strips, cotton wool balls and so forth. Post-operative course was uneventful and she was up and about in her room the following morning. She went home on 12/17/90. The parents state that following this they tried to return to the military facility for follow-up and were told that "**the base hospital doctors had changed their mins and gave them an unavailability statement." This was because they felt that "professional capability was not available at that facility."**

SUMMARY AND OPINION

This long 2 1/2 year history of a draining right ear in their infant daughter resulted in complete loss of hearing in that ear. The parents are distraught and disappointed in the medical treatment afforded their child. They have reason to believe had they not sought private outside medical care, at their own expense, the cholesteatoma would have continued to increase in size and dangerous intracranial complications (i.e.: meningitis and/or brain abscesses) might well have been the final result. Instead, Slaine Schneider now has a safe right ear, but with complete loss of hearing after a 3 year medical saga.

It is my opinion that the medical records obtained from the USA hospital, RAF, Upper Heyford, England blatantly point to negligence, in Slaine's care during the time the USAF was medically responsible; for the following reasons:

1. It was six months before an attempt to render definitive therapy. (12/28/88) to (6/27/89). Modern

diagnostic medical technology not utilized, i.e.: MRI and/or CAT scans, repeat cultures of ear discharge.

2. There was an inordinate delay in diagnosis - almost one year (12/28/88) to (11/18/89).

3. Further, after the diagnosis was confirmed, the child had another year of delay before the proper surgical procedure was performed. (12/15/90). This was performed by M. W.S. Lund, a British surgeon.

4. The lack of a consultant in the operating room when surgery was performed. Parents allege they were told Mr. Sokol would be present.

5. The child has sustained irreparable, permanent damage, and the projected costs to properly rehabilitate this disabled child will be enormous (modestly $2 million).

_____

George A. Sisson, Sr., M.D.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20332-6128

Martha L. Neese, Esquire
Lyons, Sawicki & Neese
1560 Beam Ave., Suite A
St. Paul, Minnesota 55109

Re: Medical Malpractice Claim of Slaine and Michael J. Schneider,
OD/C/XQDT/91/00527/NOM

Dear Ms. Neese

I have considered your appeal of the denial of the above referenced claim under the provisions of the Military Claims Act, 10 U.S.C. 2733. After examination of the materials which you sent, with special emphasis on the report of Dr. Sisson, I must uphold the original decision and deny the claim.

First, please be assured that the Air Force understands that claimants do not have a judicial remedy under the Military Claims Act and therefore we make every effort, where possible, to resolve issues in their favor. At times, significant communication with claimant's attorney is required. Other times, where the facts and expert medical reviews are unequivocal, protracted contact is not necessary.

In this review, Dr. Sisson cites to Dr. Lund liberally and refers to him as a well-known British neurotologist. During the course of investigating this claim, Dr. Lund was

extensively interviewed. Dr. Lund is a general otolaryngology surgeon with over 30 years experience in otolaryngology. His particular interest is otology surgery. Dr. Lund began by pointing out that cholesteatoma is an extremely difficult disease to treat in children and even more difficult to remove. While the disease is rare in children, when it does occur, it is very aggressive. He states that not even the most experienced otologist could ever be completely confident that he could surgically remove every cholesteatoma cell in a patient. A surgeon would be even less certain after a cholesteatoma operation on a child. Dr. Lund said that all ear surgeons will have repeat cholesteatoma surgeries. As an aside, he confided that he had just seen a patient that required four such surgeries.

Dr. Lund stated in no uncertain terms that Dr. Range's treatment of Slaine Schneider was not even close to medical malpractice. Dr. Range followed proper procedures in doing the surgery and scheduled appropriate follow up appointments. Dr. Lund was unable to say whether the Schneiders' failure to come back for a follow up after their May 1990 appointment with Dr. Range effected Slaine's condition but in any case, this failure did not alter the overall picture that Dr. Range treated Slaine appropriately.

In addition to the comments of Dr. Lund, the medical facts in this case were reviewed by board certified experts in Otolaryngology including a surgeon who trained under Dr. Richard Bellucci, a world-renowned otologist. After a complete review of the case, our expert concluded that the diagnosis of cholesteatoma was timely and the surgical removal was appropriate. In all probability, Slaine suffered from a rare congenital cholesteatoma. Whether congenital or acquired, the treatment was timely and appropriate. Our expert states that he would have handled the patient exactly

the same as would the other physicians who rendered an opinion.

I greatly regret that the Schneiders are dissatisfied with the Air Force care which Slaine received. The simple fact is that Slaine's course of treatment and present condition are the result of the disease process and not medical negligence. Without a showing of negligence, I simply cannot approve the claim for payment.

This is the final administrative action that can be taken on this claim.

Sincerely

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PHILIP A. MEEK, Colonel, USAF
Chief, Claims and Tort Litigation Division
Air Force Legal Services Agency

Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-552

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL SCHNEIDER AND ROISIN SCHNEIDER, INDIVIDUALLY AND AS GUARDIANS OF SLAINE SCHNEIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
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15 pp

QUESTIONS PRESENTED

The Military Claims Act, 10 U.S.C. 2735, provides that the military's resolution of claims for reimbursement shall be "final and conclusive" for all purposes, "[n]otwithstanding any other provision of law." The questions presented are:

1. Whether, in the absence of a sound constitutional claim, the federal courts lack subject-matter jurisdiction of a suit challenging the Secretary of the Air Force's resolution of a request for compensation under the Military Claims Act.

2. Whether the Secretary of the Air Force's resolution of petitioners' claim violated petitioners' Fifth Amendment rights to procedural due process or equal protection.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-552

MICHAEL SCHNEIDER AND ROISIN SCHNEIDER, INDIVIDUALLY AND AS GUARDIANS OF SLAINE SCHNEIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-15A) is reported at 27 F.3d 1327. The opinion of the district court (Pet. App. 16A-25A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1994. The petition for a writ of certiorari was filed on September 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has enacted an interlocking set of statutory provisions governing injuries caused by military employees. The Federal Tort Claims Act (FTCA) governs claims brought for injuries caused by military employees when the claims arise in the United States. 28 U.S.C. 2671, 2680(k). For injuries caused by military employees outside the United States, two other statutes govern. The Military Claims Act (MCA or Act), 10 U.S.C. 2733, permits the branches of the military to compensate citizens of the United States for injuries caused by military employees in a foreign country, while the Foreign Claims Act (FCA), 10 U.S.C. 2734-2734b (1988 & Supp. V 1993), governs claims by inhabitants of foreign countries for injuries that take place outside the United States. The schemes are mutually exclusive. See 10 U.S.C. 2733(b)(2).

2. Under the MCA, a claim must be filed with the relevant military service within two years of the injury. 10 U.S.C. 2733(b)(1); 32 C.F.R. 842.4-842.6, 842.43, 842.45. The MCA provides that the Secretary of each service "may settle [] and pay in an amount not more than $100,000, a claim against the United States for * * * personal injury * * * caused by" a military employee of his service. 10 U.S.C. 2733(a). "Settle" is defined as "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance *or by disallowance.*" 10 U.S.C. 2731 (emphasis added). The Secretary of the Air Force has delegated his settlement authority in these matters by establishing a two-tiered review system, after which the decision of the Air Force is final. 32 C.F.R. 842.42(a)-(c), 842.52(d); see 10 U.S.C. 2733(a) (authorizing Secretary to promulgate regulations). The MCA provides that "*[n]otwith-*

standing any other provision of law, the settlement of a claim under section 2733 * * * of this title is final and conclusive." 10 U.S.C. 2735 (emphasis added).

3. Petitioner Michael Schneider was stationed with the United States Air Force in Great Britain, and resided there with his wife, petitioner Roisin Schneider, and their infant daughter petitioner Slaine Schneider. Pet. App. 2A. The Schneiders took their daughter to the United States Air Force Hospital in Upper Heyford, England, for treatment for her right ear. *Id.* at 18A. In 1989, an Air Force physician performed three surgical procedures on Slaine's ear. *Id.* at 2A. These procedures were unsuccessful. Later, a fourth procedure was performed by Dr. William S. Lund, a private physician. Slaine Schneider now suffers from permanent hearing loss in her right ear. *Id.* at 2A-3A.

In July, 1991, petitioners filed a request for compensation under the MCA, contending that Slaine's hearing loss was attributable to negligence by the Air Force doctor who performed the three surgical procedures. Pet. App. 3A. On March 17, 1992, following an investigation, the Secretary's designee denied petitioners' claim. *Id.* at 3A-4A. After reviewing the medical evidence (*id.* at 26A), as well as the qualifications of the physician (*id.* at 27A), the Air Force found that "there was no breach in the standard of care in the treatment Slaine received at our facility." *Id.* at 26A. It concluded that "without evidence of negligence the claim cannot be paid." *Id.* at 27A.[1]

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[1] Under most circumstances, in order for a claimant to secure compensation for a medical malpractice claim against a military doctor, the claimant must show negligence or wrongful conduct. 32 C.F.R. 842.49(a); see *Poindexter* v. *United States*, 777 F.2d 231, 235 (5th Cir. 1985).

Petitioners filed an administrative appeal and submitted for the first time the written opinion of their expert, who concluded that Slaine had received negligent care. Pet. App. 4A, 28A-36A. In May, 1992, the Air Force affirmed the initial denial of the claim. *Id.* at 37A-39A. The appellate officer stated that his review included an examination of all the evidence, "with special emphasis on the report of" petitioners' expert. *Id.* at 37A.

The appellate officer noted that petitioners' expert "cites * * * liberally" to Dr. Lund, who was the civilian surgeon who performed the fourth operation on Slaine. Pet. App. 37A, 4A. The appellate officer explained that "[d]uring the course of investigating this claim, Dr. Lund was extensively interviewed," and that he "stated in no uncertain terms that [the Air Force physician's] treatment of Slaine Schneider was not even close to medical malpractice." *Id.* at 37A-38A. The appellate officer explained that Dr. Lund's assessment was shared by other experts who reviewed the case. *Id.* at 38A-39A. Concluding that Slaine's hearing loss was "the result of the disease process and not medical negligence," the appellate officer affirmed the disallowance of petitioners' claim. *Id.* at 39A.

Petitioners filed suit in federal district court seeking review of the Air Force's denial of their claim. Pet. App. 4A. The complaint also asserted that the military claims process denied them due process and equal protection. *Id.* at 5A. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) and (6). Pet. App. 25A.

4. The court of appeals affirmed. Pet. App. 1A-15A. The court joined every other circuit that has addressed the issue in holding that the disallowance of a claim under the MCA is not subject to judicial review in the absence of a constitutional claim. *Id.* at 9A. The court of appeals also held that petitioners had failed to state any

valid constitutional claim. *Id.* at 9A-15A. It reasoned that Congress's decision to create different compensation schemes for torts committed abroad and those committed domestically did not violate the Equal Protection Clause because treating foreign tort claimants differently does not create a suspect classification and because Congress could rationally decide against subjecting government liability to the vagaries of foreign tort law. *Id.* at 10A. The court of appeals also found no due process violation because the Act creates no protected property interest in claimants. *Id.* at 12A. Senior Judge Heaney dissented on this last issue. *Id.* at 13A-15A.

ARGUMENT

1. Petitioners argue (Pet. 10-17) that the MCA does not manifest an intent to deny judicial review. However, the MCA, by its plain terms, precludes judicial review. Section 2735 reads: "Notwithstanding any other provision of law, the settlement of a claim under * * * this title is final and conclusive." 10 U.S.C. 2735.

Section 2735 was enacted in 1956 as part of the general recodification of the United States Code. Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 155. As described in the revision notes, see *United States* v. *National City Lines, Inc.*, 337 U.S. 78, 81 (1949) (revision notes are authoritative), Section 2735 combined the virtually identical language in three statutes governing claims against the military. 10 U.S.C. 2735 (Historical and Revision Notes); S. Rep. No. 2484, 84th Cong., 2d Sess. 173 (1956); H.R. Rep. No. 970, 84th Cong., 1st Sess. 163 (1955). Each of the predecessor statutes contained the phrase "for all purposes" following "final and conclusive." 10 U.S.C. 2735 (Historical and Revision Notes). Congress omitted this final phrase "as

surplusage," *ibid.*, and did not intend the omission to affect the text's substantive import. Act of Aug. 10, 1956, ch. 1041, § 49(a), 70A Stat. 640; S. Rep. No. 2484, *supra*, at 19-21; H.R. Rep. No. 970, *supra*, at 8-10. Accordingly, the statutory text should be construed as if it still read "final and conclusive for all purposes." See *Rodrigue* v. *United States*, 968 F.2d 1430, 1433-1434 (1st Cir. 1992).

Given this unambiguous language, every court of appeals to interpret the MCA's language has agreed with the court below that Section 2735 precludes judicial review of the military's disallowance of a claim under the Act. See *Hata* v. *United States*, 23 F.3d 230, 233 (9th Cir. 1994); *Rodrigue*, 968 F.2d at 1434; *Poindexter* v. *United States*, 777 F.2d 231, 233 (5th Cir. 1985); *Broadnax* v. *United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (per curiam); *LaBash* v. *United States Dep't of the Army*, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982); *Towry* v. *United States*, 620 F.2d 568 (5th Cir. 1980) (per curiam) (adopting district court opinion, 459 F. Supp. 101 (E.D. La. 1978)), cert. denied, 449 U.S. 1078 (1981); see also *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) (interpreting similar language in one of the predecessors to the current MCA to foreclose judicial review). While petitioners rely (Pet. 11, 15-17) on this Court's presumption in favor of interpreting statutes to allow judicial review of administrative action, "[t]he presumption favoring judicial review of administrative action is just that—a presumption * * * [which] like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

In addition to the patently clear language noted above, the legislative history of the MCA indicates that Congress did not intend to permit judicial review. When

Congress first enacted the MCA in 1945, both the House and the Senate reports included a letter from the Acting Secretary of War stating that:

> In the absence of fraud or mistake in mathematical calculations, the findings of fact, conclusions of law, and the decision of the Secretary of War, or his designee, upon the merits of any claim, would not be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

H.R. Rep. No. 237, 79th Cong., 1st Sess. 4 (1945); S. Rep. No. 276, 79th Cong., 1st Sess. 4 (1945). The legislative history of subsequent amendments to the MCA confirm Congress's intent to preclude judicial review.[2]

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[2] See, *e.g.*, S. Rep. No. 1056, 92d Cong., 2d Sess. 3 (1972) ("The effect of the provision as to finality is merely to provide that a final settlement is final *in the full sense of the word* and will not be subject to reopening as to that specific claim.") (emphasis added); H.R. Rep. No. 68, 92d Cong., 1st Sess. 2 (1971) (same); S. Rep. No. 1423, 88th Cong., 2d Sess. 9 (1964) ("*No provision is made for appeal to the courts.* On the contrary, the bill provides that the administrative settlement of a claim is final and conclusive.") (emphasis added).

It is also relevant that Congress used the same language that appears in Section 2735 in the National Guard Claims Act (NGCA), 32 U.S.C. 715. The legislative history of the NGCA reveals that Congress used Section 2735 as a model for 32 U.S.C. 715(g) to ensure that no judicial review of administrative proceedings would be permitted. H.R. Rep. No. 1928, 86th Cong., 2d Sess. 7 (1960) ("While it is not considered appropriate to grant *judicial* relief against the United States * * * it is considered appropriate to make provision for the *administrative* relief of such claimants to *the same extent as relief would be afforded under section 2733 of title 10.*") (emphases added); see *Rhodes* v. *United States*, 760 F.2d 1180, 1184 (11th Cir. 1985) (language in the NGCA precludes judicial review).

Given the MCA's plain language, consistent legislative history, and uniform court interpretations, the court of appeals correctly determined that judicial review of statutory challenges to a settlement under the MCA is prohibited.

2. Petitioners assert (Pet. 17-26) a variety of constitutional violations. Even if judicial review is available for such claims, cf. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 & n.12 (1986), the court of appeals correctly found them to be without merit.

a. Petitioners argue (Pet. 17-19) that Congress's creation of two different compensation schemes, the FTCA for torts committed domestically and the MCA and FCA for those committed abroad violates the equal protection component of the Fifth Amendment. Because no suspect classification or fundamental right is involved, this Court will not strike down such a difference unless petitioners can clearly demonstrate its irrationality. See *Kadrmas* v. *Dickinson Pubic Schs.*, 487 U.S. 450, 462 (1988). It is, however, rational and legitimate for Congress not to subject the United States to the vicissitudes of foreign tort law. See, *e.g.*, *United States* v. *Spelar*, 338 U.S. 217, 221 (1949); *Heller* v. *United States*, 776 F.2d 92, 98 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986); cf. *Smith* v. *United States*, 113 S. Ct. 1178, 1181-1183 (1993). It is also rational for

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Petitioners contend (Pet. 12) that a letter appended to the 1972 Senate Report creates sufficient doubt to overcome Section 2735's plain language and to read a judicial review provision into the MCA. The 1972 letter, however, was commenting in response to specific concerns about General Accounting Office review, see S. Rep. No. 1056, *supra*, at 4; H.R. Rep. No. 68, *supra*, at 2-3, and is in no way inconsistent with reading Section 2735 to foreclose judicial, as well as administrative, review.

Congress to decide to utilize an administrative, rather than a judicial, process to settle claims arising against it in foreign countries.

b. Petitioners also claim (Pet. 19-26) that the Air Force denied them procedural due process. Assuming that petitioners were deprived of a constitutionally protected liberty or property interest, see *Board of Regents* v. *Roth*, 408 U.S. 564, 569-572 (1972), petitioners received all of the process they were constitutionally due. "The essential requirements of due process * * * are notice and an opportunity to respond." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985). Petitioners had full notice of their claim's processing, submitted arguments and expert evidence through letters and written statements, and received decisions from the Air Force responding directly to their evidence and arguments. Petitioners have not identified any relevant information that either could not be or was not conveyed by them to the Air Force under the Air Force's procedures. Decisions of this Court and the courts of appeals recognize that due process does not always require an adversarial hearing or cross-examination, especially when the information collected is medical or scientific. *Mathews* v. *Eldridge*, 424 U.S. 319, 344-345 (1976); *Richardson* v. *Perales*, 402 U.S. 389, 402-403 (1971); *Hata*, 23 F.3d at 234; see also *Bohn* v. *County of Dakota*, 772 F.2d 1433, 1438 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); *Hanke* v. *Walters*, 740 F.2d 654, 656-657 (8th Cir. 1984).[3]

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[3] Cross-examination of witnesses or requiring the presence of counsel is often exceedingly difficult and expensive in the circumstances covered by the MCA. By their nature, MCA cases often involve servicemembers, experts, witnesses, and military officials who may all be located in different countries. In this case, for example, the petitioners were stationed in Italy, their counsel

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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was in Minnesota, Air Force counsel was in Washington, D.C., and many of the experts and witnesses were in England.